

M I L L E R & V A N E A T O N

P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
WILLIAM L. LOWERY
NICHOLAS P. MILLER
MATTHEW K. SCHETTENHELM**
JOSEPH VAN EATON

*Admitted to Practice in
California Only

**Admitted to Practice in
Maryland Only

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
400 MONTGOMERY STREET
SUITE 501
SAN FRANCISCO, CALIFORNIA 94104-1215
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:
JAMES R. HOBSON
NANNETTE M. WINTER†
GERARD L. LEDERER
WILLIAM R. MALONE
JOHN F. NOBLE

†Admitted to Practice in
New Mexico Only

March 15, 2005

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Notice of Ex Parte Presentation in IP Enabled Services,*
 WC Docket Nos. 04-29, 04-36 and 03-211

Dear Madame Secretary:

On this date, representatives of the Local Government Alliance met with the following individuals:

- Scott Bergman, Legal Advisor to Commissioner Adelstein,
- Daniel Gonzales, Senior Legal Advisor to Commissioner Martin,
- Jeffrey J. Carlisle, Chief, Wireline Competition Bureau,
- Pamela Arluk, Legal Counsel Wireline Competition Bureau,
- Tom Navin, Chief, Competition Policy Division,
- Julie Veach, Assistant Division Chief, Competition Policy Division, and
- Tim Stelzig, Attorney, Competition Policy Division

In addition to myself, representing the Local Government Alliance were:

- Honorable Ken Fellman, Mayor, Arvada, Colorado,
- Elizabeth Beaty of the National Association of Telecommunications Officers and Advisors, and
- Cheryl Leanza of the National League of Cities,

The purpose of the meeting was to share with Commission local governments' ongoing concerns with the FCC's NPRM in the above identified matter. The content of the discussions that took place in these meetings is reflected in the attached two page summary of the Local Government Alliances' filings.

Please contact the undersigned with any questions.

Sincerely,

Miller & Van Eaton, P.L.L.C.

/ S /

By

Gerard Lavery Lederer

cc: Scott Bergmann (scott.bergmann@fcc.gov)
Daniel Gonzalez (daniel.gonzalez@fcc.gov)
Jeffrey Carlisle (jeffrey.carlisle@fcc.gov)
Pamela Arluk (Pamela.Arluk@fcc.gov)
Tom Navin (Tom.Navin@fcc.gov)
Julie Veach (Julie.Veach@fcc.gov)
Tim Stelzig (Tim.Stelzig@fcc.gov)

Ex Parte Meetings of March 15, 2005

LOCAL GOVERNMENTS' VIEWS ON IP ENABLED SERVICES (WC Docket No. 04-36)

- I. Local government is enthusiastic about the benefits that VoIP may offer local government and its constituents. We strongly support competition, the rollout of new services, and the economic growth that accompanies new technological developments. But prudent policy development requires careful attention to all of the potential ramifications of such developments and attendant regulatory decisions.
- II. The history of communications regulation is a success story. In a dynamically changing world of technology, the Communications Act has restrained monopoly power, extended universal service, required socially responsible actions by major communications vendors, and supported the fundamental democratic and economic underpinnings of our democracy.
- III. Commission action must respect and build on this history as it considers the disruptive and revolutionary potential of IP-enabled services. Specifically:
 - Commission actions must be consistent with the terms of Titles II, III, and VI of the Act.
 - Actions outside the framework of the Act require specific authority from Congress.
 - Title I does not authorize the Commission to redraw the jurisdictional boundaries and regulatory framework established by the Act.
 - The scope of Commission's jurisdiction over information services is extremely limited. *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) established that the Commission lacks authority to regulate the provision of information services by entities not involved in regulated activities. In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) the Supreme Court established that the Commission may adopt rules governing otherwise unregulated entities – but only to the extent the Commission seeks to advance the policies of Title II, Title III or Title VI of the Act.
- IV. The Commission must not take any action that threatens the effectiveness of universal service, CALEA, 911 services, access to persons with disabilities, or consumer protections. Promoting IP-enabled services without due regard to those policies could have undesirable consequences. Instead, the Commission should act to extend those policies to IP-enabled services, in a technology-neutral manner.

- V. The Commission may not have the power to implement the following nine principles that were articulated in Local Government's reply comments, but any attempt to establish a fair, rational, and efficient regulatory structure must include them:
- The federal government should act to promote technological progress while protecting the rights and interests of all affected parties.
 - Federal law should regulate the "facilities" layer and two or three facilities owners are insufficient to provide meaningful competition.
 - Service providers should pay fair prices for access to networks.
 - Facilities owners should pay fair prices for their use of public property, regardless of their choice of technology.
 - Federal law should forbear from economic regulation of service providers in competitive markets.
 - All service providers should be required to contribute towards support of universal service.
 - All providers of voice services should be required to offer E-911 functionality and disability access.
 - The federal government should respect and preserve the police powers of state and local governments.
 - All facilities-based providers should be required to make capacity available for public use.
- VI. There are a number of policy considerations that are not addressed in the NPRM, including:
- Respecting and preserving the police powers of state and local governments, including right-of-way management authority, zoning, and cable customer service.
 - Facilities owners that do not face meaningful competition should be regulated accordingly.
 - A recognition that Commission action is not intended to affect local taxing authority.
 - Preservation of PEG access channels, which promote open government, free speech, and public participation in community affairs.
 - Users of the public rights-of-way should pay fair prices for the use of public property.

- VII. Finally, asserting jurisdiction and then forbearing from regulation is not the answer. The Commission's forbearance power is limited to telecommunications carriers and telecommunications services, so it is not a universal principle. Furthermore, any effort to forbear that undercuts any of the other public policies of concern to local governments would not be in the public interest.